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Law and Practice

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Shearn Delamore & Co's Employment and Administrative Law Practice Group consists of six partners, one senior legal associate and two legal associates. Our dedicated team of lawyers assists employers to manage legal matters relating to employment and industrial relations effectively. As the first firm in the country to establish a focused-driven team catering exclusively for the practice of employment and administrative law, we have a rich and diversified experience in this area. Today, our Employment and Administrative Law Practice Group continues to offer comprehensive representation and assistance to clients involved in various stages of employment-related dispute resolution. We have been engaged in cases that have contributed to the evolution and expansion of administrative law in this country. The practice continues to keep abreast of changes to the law to advise clients regularly on the nature and implications of key amendments. We offer strategic legal advice on terms and conditions of employment, employee disciplinary actions and employment termination, collective bargaining and collective agreements, complex employment issues, industrial action (strikes and pickets), union issues (union recognition and scope of union representation), legal representation for employers (before employment tribunals, various levels of the judicial hierarchy, quasi-criminal proceedings), M&A HR and restructuring (retrenchment, business sale/integration, business closure, harmonisation of benefits), separation schemes (voluntary separation and mutual separation schemes as well as early retirement).

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1. Terms of Employment

1.1 Status of Employee

In Malaysia, workers are generally categorised under the following types:

- Workers who are covered under the scope of the Malaysian Employment Act 1955 ("EA 1955")
- Workers who are not covered under the scope of the EA 1955.

The EA 1955 covers all employees specified under the First Schedule. This, in general, covers employees whose wages do not exceed RM2,000.00 per month. Those engaged in manual work are also covered by the provisions of the Act even though they may earn above the statutorily prescribed sum. Wages would mean basic wages and all fixed allowances excluding any travelling allowance, overtime payment, commission, subsistence or cost of living allowance, annual bonus and gratuity payable at the end of a contract or on retirement. There is no definition provided for the term 'manual workers'. There are several case laws which may provide some assistance in defining which workers are considered manual workers and which are not.

There are different types of work arrangements, as follows:

- Regular full-time;
- Fixed-term;
- Part-time;
- Casual workers;
- Independent contractors.

1.2 Contractual Relationship

Employment contracts would vary depending on the job purpose and the work arrangements. The common employment contracts are full-time, fixed-term, part time, casual workers and independent contractors.

For workers under the scope of the EA 1955, there must be an employment contract in writing if the employment lasts for more than one month. The employment contract must also include a provision for termination. Notwithstanding the absence of a written employment contract, the same can be created by implication or conduct of the parties.

1.3 Working Hours

Subject to certain exceptions which are applicable to shift workers, the EA 1955 provides that the hours of work (excluding overtime) of an employee shall not exceed eight hours a day. In one week, the total hours must not exceed 48 hours. The EA 1955 also provides that an employee shall not be required to work more than five consecutive hours without a rest time (of not less than 30 minutes).

Specific terms required for part-time contracts

The Employment (Part-Time Employees) Regulations 2010 provides for the following statutory benefits:

- Overtime pay:
  (a) if the overtime exceeds the part-timer's normal working hours but not a full-time worker's working hours – 1 x hourly rate of pay for each hour or part thereof;
  (b) if the overtime exceeds the part-timer's normal working hours and also exceeds a full-time worker's working hours – 1.5 x hourly rate of pay for each hour or part thereof.
- Public holidays: eight paid gazetted public holidays (as compared to 11 days for full-time workers). Out of this, five must be the National Day, the King's birthday, Labour Day, the State Ruler's birthday (depending on where the worker works) and Malaysia Day. The employer and employee are free to agree on the remaining three days or for any other day or days to be substituted for the gazetted public holidays.
- Work on public holidays:
  (a) During normal working hours – two days' wages plus the holiday pay for that particular day;
  (b) if exceeding the part-timer's normal working hours – two times the hourly rate of pay for each hour or part thereof;
  (c) if exceeding a full-time worker's working hours – three times the hourly rate of pay for each hour or part thereof.
- Annual leave: six days if employed for less than two years, eight days if employed for between two years to five years, and 11 days if employed for five years and above.
- Sick leave: ten days if employed less than two years, 13 days if employed for between two years to five years, and 15 days if employed for five years and above.
- Rest day: a part-timer who works five days or more for a minimum of a 20-hour work week must be given a weekly rest day.
- Work on rest day:
  (a) During normal working hours – two days' wages
  (b) if exceeding the part-timer's normal working hours but not a full-time worker's working hours – one and a half times the hourly rate of pay for each hour or part thereof;
  (c) if exceeding a part-time worker's working hours and also a full-time worker's working hours – two times the hourly rate of pay for each hour or part thereof.

However, please note that the Employment (Part-Time Employees) Regulations 2010 do not apply to a part-time employee:

- whose working hours in one week do not exceed 30% of the normal working hours of a full-time employee;
- who performs work for an employer within the employee's residence, irrespective of occupation.

Overtime regulations

For employees who are within the purview of the EA 1955, overtime payment needs to be paid. For overtime in excess of the normal hours of work per day, the employee shall be paid at a rate not less than one and a half times his or her hourly rate. For overtime in excess of the normal hours of work on a paid public holiday, the employee shall be paid at a rate which is not less than three times his or her hourly rate. The limit of overtime work for employees within the purview of the EA 1955 shall be a total of 140 hours in any one month.

In respect of employees who are not within the purview of the Employment Act 1955, it would depend on the contract of employment.

1.4 Compensation

Minimum wage requirements

The Minimum Wages Order 2016 came into effect on 1 July 2016 and sets out the minimum wage rates payable to the employees. For employees working in Peninsular Malaysia, the monthly minimum wages rate is RM1,000.00 while for employees in Sabah, Sarawak and Federal Territory of Labuan, the rate is RM920.00.

The government has recent announced that the minimum wage rate will be increased to RM1,050.00 throughout the whole of Malaysia, with effect from 1 January 2019.

For employees who are paid daily wages, the minimum rate depends on the number of working days in a week. In Penin-

sular Malaysia, the rate is RM38.46 if working for six days a week, RM46.15 if working for five days a week and RM57.69 if working for four days a week. In Sabah, Sarawak and Federal Territory of Labuan, the rate is RM35.38 if working for six days a week, RM42.46 if working for five days a week and RM53.08 if working for four days a week.

In respect of employees who are paid hourly wages, the minimum rate is RM4.81 for employees in Peninsular Malaysia and RM4.21 for employees in Sabah, Sarawak and Federal Territory of Labuan.

Employers have the discretion to include a provision on thirteenth month payment and bonus in the employment contract. This is not, however, a statutory obligation. Normally, the payment of the thirteenth month and bonus is subject to the performance of the individual, team and the company as a whole.

The Government of Malaysia does not intervene in the quantum of compensation or increment to be paid to the employees. It is left to the discretion of the employer.

1.5 Other Terms of Employment

Discuss vacation and vacation pay

For employees within the purview of the EA 1955, the entitlement to annual leave would depend on the length of service. For an employee who has been employed for less than two years, he or she would be entitled to eight days of paid annual leave. For an employee who has been employed more than two years but less than five years, he or she would be entitled to 12 days of paid annual leave. For an employee who has been employed for five years and more, he or she would be entitled to 16 days of paid annual leave.

The EA 1955 provides that every employee must be given a rest day in each week.

For employees not within the purview of the Employment Act 1955, the entitlement would depend on the employment contract.

Required leave

For employees who are covered under the EA 1955 and where hospitalisation is not necessary, the employees would be entitled to the medical leave depending on the length of service with the employer. The entitlement would be 14 days for an employee who has been employed for less than two years, 18 days for an employee who has been employed for more than two years but less than five years and 22 days for an employee who has been employed for five years or more.

Where hospitalisation in necessary, 60 days of sick leave is the aggregate for each year. It should be noted that the total paid (with or without hospitalisation) for each calendar year shall not exceed 60 days.

In respect of public holidays, an employee under the scope of the EA 1955 shall be entitled to a total of 11 gazetted public holidays *as well as* any day declared as a public holiday under section 8 of the Holidays Act 1951. Of the 11 gazetted public holidays, five of them will be:

- the National Day;
- the Birthday of the King of Malaysia;
- the Birthday of the Ruler or the Head of State where the employee works, and in the case of the Federal Territory, the day will be the Federal Territory Day;
- Workers' Day;
- Malaysia Day.

For employees not within the purview of the Employment Act 1955, the entitlement to sick leave and public holidays depends on the employment contract.

Irrespective of whether she is covered under the EA 1955 or otherwise, every female employee in Malaysia shall be entitled to 60 consecutive days of paid maternity leave.

Limitations on confidentiality, non-disparagement requirements

Employers would usually insert a provision into the employment contract requiring the employees to maintain confidentiality during and after the cessation of employment. The main purpose is to ensure that confidential information belonging to the employer is not being misused by the employee. Notwithstanding the absence of an express clause on confidentiality in an employment contract, case law has held that the employee owes an implied duty of confidentiality towards the employer.

There are limitations on confidentiality requirements, including the following: any information that is in the public domain (ie easily accessible to the public) ceases to be confidential; information that does not come within the scope of confidentiality (for example, trivial information); and the disclosure of information which is justified on the grounds of public interest or policy.

Employee liability

An employee who wishes to resign must give notice of termination as required under the employment contract. The employee's obligation under the employment contract would continue until the expiry of the notice period. In the event that the employee fails to provide the necessary notice period, the employee would be liable to pay the employer salary in lieu of the contractual notice period.

2. Restrictive Covenants

2.1 Non-Competition Clauses

Section 28 of the Malaysian Contracts Act 1950 prohibits any form of restraint of trade and consequently any provisions in the employment contract which seek to impose restraint of trade are void. The relevant section stipulates as follows:

"Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void."

There are, however, three exceptions to the general rule of restraint under the aforesaid section. The first exception applies in cases where a party who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein.

The second exception relates to a situation where partners may upon, or in anticipation of, a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits that are reasonable, having regard to the nature of the business.

The last exception is where partners may agree that one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

It will be noted that the Malaysian law on trade restraint differs from the common law position. In common law, the validity of a trade restraint is measured by the reasonableness test whereby the courts will to a certain degree permit a trade restraint based on the time and space that it considers as reasonable.

In Malaysia, employment-based non-competition agreements are only enforceable during the subsistence of the employment relationship. Any restraint, post-cessation of the employment relationship, is unenforceable.

2.2 Non-Solicitation Clauses - Enforceability/ Standards

Non-solicitation provisions that prohibit solicitation and/or hiring of former colleagues in the employment contract are not valid owing to Section 28 of the Contracts Act 1950. Further, it will be difficult to prove that the employee was solicited or enticed by the ex-employee to leave the employer.

Similarly, non-solicitation provisions that prohibit the solicitation of customers are not valid owing to Section 28 of the Contracts Act 1950.

3. Data Privacy Law

3.1 General Overview of Applicable Rules

The Personal Data Protection Act 2010 ("PDPA") came into effect on 15 November 2013. It was enacted to regulate the processing of personal data in commercial transactions and applies to any person who processes, and any person who has control over or authorises the processing of, any personal data in respect of commercial transactions. Commercial transactions are widely defined to cover any matter relating to the supply of services, which will most likely cover employment contracts. The PDPA makes it compulsory for a data user essentially to obtain the consent of the individual prior to the processing of personal data, and to comply with seven Personal Data Protection Principles, which are as follows:

a. General Principle;
b. Notice and Choice Principle;
c. Disclosure Principle;
d. Security Principle;
e. Retention Principle;
f. Data Integrity Principle; and
g. Access Principle.

Failure to comply with any of the above principles constitutes an offence which is punishable by a fine not exceeding RM300,000 or imprisonment for a term not exceeding two years, or both. The PDPA also regulates the transfer of personal data to locations outside Malaysia. The PDPA is enforced by the Personal Data Commissioner.

The processing of sensitive personal data would require the explicit consent of the individual and only for the specific purposes as stated under Section 40(1)(b) of the PDPA. Sensitive personal data consists of information on the individual's physical or mental health condition, political opinions, religious beliefs and other beliefs of a similar nature, and the perpetration or alleged perpetration of any offence by the individual.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers

Foreign workers are only permitted to work in specified sectors of the economy such as manufacturing, construction, plantation, agriculture and services, and must come from approved source countries.

4.2 Registration Requirements

Employers who intend to hire foreign workers must apply for a quota from the Ministry of Home Affairs. Foreign workers must not be below 18 years of age and not more than 45 years old. Additionally, the foreign workers must be certified for

immigration security clearance as well as certified as fit and healthy in their respective source countries.

Prior to the arrival of the foreign workers, the employers must apply for a Visa with Reference from the Immigration Department. Foreign workers are only permitted to enter Malaysia after the issuance of the Visa with Reference.

Within 30 days of arrival, the foreign workers must undergo a medical examination. If the foreign worker is certified fit after the medical examination, a Visit Pass (Temporary Employment) will be issued to them, which is valid for 12 months. Foreign workers are only allowed to work in Malaysia for a maximum of ten years.

The requirements/conditions to hire foreign workers are subject to the prevailing policy introduced by the government from time to time.

5. Collective Relations

5.1 Status of Unions

A national union is commonly known as a trade union and is established to represent employees from many employers within the same industry. An in-house trade union is a union that is formed exclusively to represent employees within a particular company. It cannot represent employees from another company even though the latter are from the same industry.

The role of a trade union of employees includes:

- Engaging in collective bargaining;
- Organising industrial action; and
- Raising trade disputes.

A trade union must first be accorded recognition before the parties can commence collective bargaining. Upon being accorded recognition, the trade union will bargain on behalf of the employees and, in this regard, acts as a principal and not as an agent of its members.

Once recognition is granted, it stands as long as the trade union exists, even if only one employee of the company is left as a member of the union.

5.2 Employee Representative Bodies - Elected or Appointed

Malaysian legislation recognises a trade union as the representative body of the employees. There is no other form of representative body.

5.3 Collective Bargaining Agreements

A Collective Agreement is the result of collective bargaining and is similar to contracts of employment legally enforceable by either party. It contains the mutual obligations between the company and the union/employees and relates to the terms and conditions of employment such as rates of wages and hours of work, as well as regulating the relations between the parties.

The trade union cannot include the following as part of its proposals for a Collective Agreement:

- Promotion to a higher grade or category;
- transfer provided that such transfer does not entail a change to the detriment of a worker in regard to their terms of employment;
- employment in the event of a vacancy;
- termination on grounds of redundancy/reorganisation;
- dismissal and reinstatement;
- assignments etc to an employee which are consistent with their terms of employment.

In the event that any of the terms in the Collective Agreement are more favourable than the provisions of the EA 1955, the terms of the Collective Agreement will prevail. Conversely, any term or condition of employment less favourable or in contravention of the law shall be void.

After the terms of the Collective Agreement have been agreed upon by both parties, the agreement must be deposited in the Industrial Court for it to be taken cognisance of. Once a Collective Agreement has been taken cognisance of by the Industrial Court, it shall be deemed to be an award and shall be binding on:

- the parties to the agreement, including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and
- all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

In the event that parties cannot reach a consensus as to the terms to be incorporated into the Collective Agreement, the matter will be raised as a trade dispute and referred to the Industrial Court for determination. The terms of a collective agreement handed down pursuant to an Award of the Industrial Court shall remain in force until varied by a subsequent award or agreement between the parties.

6. Termination of Employment

6.1 Grounds for Termination

Motivation

In Malaysia, employees can only be dismissed with just cause and excuse. There is no motivation required to establish the grounds for termination. The legislation, however, does not define the term "just cause and excuse". Generally, the potentially justifiable reasons to dismiss an employee are:

- gross misconduct;
- poor or unsatisfactory performance;
- redundancy.

Procedures

For employees within the scope of the EA 1955, termination on the grounds of misconduct should only be made after due inquiry. While due inquiry is not defined, it essentially means that the employer must give reasonable opportunity for the employee to respond to the allegations of misconduct by issuing a show-cause letter. It is not necessary for the employer to conduct a domestic inquiry proceeding but the same would add value to the fact that the employer had given due inquiry to the employee prior to the termination.

For employees outside the scope of the EA 1955, procedures are found in the employment contract or employee handbook or the company's policy. Nevertheless, case law has provided certain procedures to be followed prior to termination.

Dismissal due to misconduct:

It would be advisable for the employer to issue a notice containing the allegations of misconduct to the employee for the purpose of providing an opportunity for the employee to state his or her defence/explanation. Depending on the answer provided by the employee, the employer may choose to conduct a domestic inquiry proceeding or proceed with the dismissal of the employee.

Dismissal due to poor performance:

Generally, before an employee is dismissed on the grounds of poor or unsatisfactory performance, the following steps must be complied with:

- The employee must be warned about their poor performance;
- The employee must be given sufficient opportunity to improve their performance;
- Despite the warnings and opportunities, it must be shown that the employee failed to improve.

Dismissal due to redundancy:

It is recommended under the Code of Conduct for Industrial Harmony for the employer to hold a consultation with the employees' representatives or their trade union. The Collective Agreement may include provisions relating to the need to have a consultation with the union prior to undertaking any proposed retrenchment exercise.

The said Code also provides that if retrenchment becomes necessary, the employer should take the following measures:

- Giving as early a warning as practicable to the employees affected;
- Introducing schemes for voluntary retrenchment and for payment of redundancy benefits;
- Retiring employees who are beyond their normal retirement age;
- Assisting the employees to find alternative employment.

It should be noted that the said Code is not a legally binding document and serves as a guide only.

The employer must inform the Labour Department via the requisite PK Forms at least one month before the retrenchment. The failure to do so can result in financial penalties against the company. Subsequent to the filing of the forms, and after the retrenchment exercise, there is also a requirement to revert to the Labour Department with additional information on the exercise and payments made to the employees.

However, the notification to the Labour Department does not amount to obtaining its approval or sanction before proceeding with the dismissal.

In a situation where the company is unionised and there is a collective agreement, the collective agreement will normally provide that the trade union be given prior notice before any notice is given to the employee. The collective agreement may also provide that discussions be held with the trade union. However, no agreement or approval of the trade union is necessary before implementing any retrenchment exercise.

Collective redundancies

In order for the employer to justify termination on the ground of redundancy, the following conditions must be established:

- There is a need for the reorganisation leading to the redundancy;
- That there is an actual redundancy;
- The retrenchment of the employee is based on an objective and fair selection criterion, such as the principle of Last In First Out (LIFO).

Among the accepted justifications for reorganisation would be the loss of business, closure of a department, reduced turnover and outsourcing. Once it is established that there is a need for reorganisation, the employer would need to show that there is a surplus of labour whereby a particular job is no longer required or necessary to support its business requirements. In selecting employees to be retrenched, the employer should follow the LIFO principle which requires a more junior employee in the category of employment to be retrenched. "Category" refers to a particular description of work and is distinguishable from a grade or scale. For example, a sales manager is considered to be in a different category from a sales executive. However, it is not mandatory for the employer to follow the LIFO principle and it can depart in the following situations:

- Where the employer has adopted an objective and fair selection criteria;
- Where the more senior employee who has been retrenched had a poor performance record;
- Where it can be established that the more junior employee has special skills or qualifications needed for the business requirements.

6.2 Notice Periods/Severance

Notice periods

A party intending to terminate the employment contract must provide notice as per the employment contract. In the absence of an express provision of such nature, the minimum notice period is provided under the EA 1955 as follows:

- four weeks' notice for employees with less than two years' service;
- six weeks' notice for employees with more than two years but less than five years' service; and
- eight weeks' notice for employees with more than five years' service.

If no or inadequate notice is given, salary in lieu of the shortfall notice would be payable.

Severance

The Employment (Termination and Lay-off Benefits) Regulations 1980 ("Regulations"), provides for the payment of lay-off benefits where an employee is laid off. According to Regulation 5 of the Regulations, an employee is deemed to be laid off if:

a. the employer does not provide work for them on at least 12 normal working days within any period of four consecutive weeks; or

b. the employee is not entitled to any remuneration for the period or periods (within such period of four consecutive weeks) in which they are not provided with work contracts or their contract is terminated as a result of a change of ownership in business.

If an employee within the meaning of the EA is retrenched, the obligation to pay termination benefits would arise. The Regulations also provide that termination benefits are payable where there is a termination for any reason other than in the case of resignation, retirement or dismissal for misconduct.

Regulation 6 of the Regulations provides for the calculation of lay-off and termination benefits payment where an employee is entitled to payment not less than the following:

(a) ten days' wages for every year of employment under a continuous contract of service with the employer if he or she has been employed by the employer for a period of less than two years; or

(b) fifteen days' wages for every year of employment under a continuous contract of service with the employer if he or she has been employed by the employer for two years or more but less than five years; or

(c) twenty days' wages for every year of employment under a continuous contract of service with the employer if he or she has been employed by that employer for five years or more.

In respect of an incomplete year of service, the payment of termination benefits shall be calculated on a pro rata basis to the nearest month. There is no external advice or authorisation required for the notice period or severance payment.

6.3 Dismissal for (Serious) Cause (Summary Dismissal)

Definition

For termination on the grounds of misconduct, the termination would be summary in nature (ie the employee would not be provided with notice of termination or any salary in lieu thereof).

Procedure and formalities

The procedures are similar to those mentioned in **section 6.1 Grounds for Termination** above.

Consequences

An employee who deems the termination to be without just cause has recourse to file a complaint with the Industrial Relations Department under Section 20 of the Industrial Relations Act 1967 ("IRA 1967") seeking the remedy of reinstatement. The employee is required to file the complaint in writing to the Director General of Industrial Relations within sixty days from the date he or she considered him or herself as being dismissed by the employer. In the event that the matter cannot be amicably settled at that stage, the

Minister of Human Resources will then determine whether the matter is fit to be referred to the Industrial Court for adjudication. The employer and former employee both have the option of challenging a reference (or non-reference as the case may be), by way of judicial review proceedings of application in the High Court.

In the event that, after the trial process, the Industrial Court is of the view that the dismissal was effected without just cause or excuse, the Industrial Court can order the employee to be reinstated to his or her former position with back-wages of up to 24 months' salary.

In the event that the Industrial Court is of the opinion that reinstatement is not an appropriate remedy to be accorded to the employee, the Industrial Court will award the employee compensation in lieu of reinstatement of one month for every year of service that the employee has completed with the employer in addition to the back-wages mentioned above.

In calculating the liability of the employer, the Industrial Court is also bound to take into consideration any contributory conduct of the employee (if the same is established) and post-dismissal earnings (if there is evidence of the same), and to make any necessary deductions from the back-wages given.

6.4 Termination Agreements

Both the employer and employee may agree voluntarily to cease the employment contract by entering into a mutual separation agreement. Normally, the employer would offer a separation benefits or ex gratia payment in consideration for the cessation of the employment contract. There is no specific procedure or formalities to observe. However, the mutual separation agreement could still be considered as termination of employment as there is still a risk that the employee may file a claim of unfair dismissal alleging that he was coerced into entering the mutual separation agreement. In order to minimise such a risk, the employee should never be threatened with dismissal or adverse consequences should they decline the mutual separation agreement.

The mutual separation agreement may contain provisions that the employee shall release the employer from any future claims or damages arising from the cessation of employment. As stated in the previous answer, such provisions will still not bar the employee from filing a subsequent complaint of unfair dismissal.

6.5 Protected Employees

Section 37(4) of the EA 1955 provides that a female employee shall not be terminated during the period in which she is entitled to maternity leave except on the grounds of closure of the employer's business. It is pertinent to note that the EA 1955 is silent on the definition of "closure of business". In the event that the employee is ill after the expiry of her maternity leave and, as a result, unable to report back to work, and that the illness arose as a result of her pregnancy, the employee cannot be terminated before a 90-day period has passed.

Section 60M of the EA 1955 further provides that the employer is prohibited from terminating the contract of a local employee for the purpose of employing a foreign employee.

7. Employment Disputes

7.1 Anti-Discrimination Issues

Grounds

Malaysia does not have any legislation that deals specifically with anti-discrimination issues. However, several pieces of legislation contain provisions that seek to prohibit discrimination, but in limited instances.

Article 8 of the Malaysian Federal Constitution provides that all persons are equal before the law and prohibits discrimination on the grounds of religion, race, descent, place of birth or gender in:

- Any law;
- The appointment to any office or employment under a public authority;
- The administration of any law relating to acquisition, holding or disposition of property; or
- The establishing or carrying on of any trade, business, profession, vocation or employment.

However, case law has ruled that constitutional provisions such as Article 8 do not apply to the private sector, only to public bodies.

Section 60L of the EA 1955 empowers the Director General of Labour to enquire into a complaint by a local employee that he or she is being discriminated against in relation to a foreign employee or vice versa in respect of the terms and conditions of employment. It will be noted that this is only applicable to the employees who are covered under the EA 1955.

Section 5(1)(c) of the Industrial Relations Act 1955 provides that employers should not discriminate against any person in regard to his or her employment, promotion, any condition of employment or working conditions on the grounds that he or she is or is not a member or officer of a trade union.

Burden of proof

In order for unfair discrimination to be actionable, the individual must prove the following elements:

- There must be some form of discrimination accompanied by an element of harshness or unfairness;
- The discrimination must be unfair in that it favours one over another; and
- The individual must be able to demonstrate that he or she has suffered some injury that is recognised by the law (damages) which take the form of pecuniary or non-pecuniary loss.

Relief-damages
In the event that the individual is able to prove the elements of unfair discrimination, the individual may be entitled to damages.

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8. Dispute Resolution

8.1 Judicial Procedures
There are no specialised employment forums for dispute resolution involving employment.

There are only individual claims for unfair dismissal at the Industrial Court, but upon application the court may hear and determine the cases together.

A party in any proceedings before the Industrial Court may be represented:

- Where the party is a trade union – by an officer or employee of the trade union;
- Where the party is an employer – appearing him or herself personally or by a duly authorised employee or by an officer or employee of a trade union of employers of which he or she is a member;
- Where the party is a workman – appearing personally or, where he or she is a member of a trade union, represented by an officer or employee of the trade union;
- All the above parties can also be represented by an advocate (with the permission of the President of the Industrial Court) or by any official of an organisation of employers or of workmen registered in Malaysia.

8.2 Alternative Dispute Resolution
Arbitration is possible.

Whether pre-dispute arbitration agreements are enforceable depends on the clauses and provisions of the agreements.

8.3 Awarding Attorney's Fees
At the Industrial Court, the prevailing party would not be awarded any costs or attorney's fees.